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14 ISLA VISTA")

15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

17 JUNAN CHEN, KELLY YAO WANG,  
18 CHANGSHUANG WANG,  
19 JINSHUANG LIU, LICHU CHEN, and  
20 WENQUEI HONG,

21 Plaintiffs,

22 v.

23 COUNTY OF SANTA BARBARA;  
24 SANTA BARBARA COUNTY  
25 SHERIFF'S DEPARTMENT; CAPRI  
26 APARTMENTS AT ISLA VISTA;  
27 ASSET CAMPUS HOUSING, and  
28 DOES 1 through 200, Inclusive,

Defendants.

Case No. 2:15-CV-01509- JFW (JEMx)  
[The Hon. John F. Walter]

**NOTICE OF MOTION AND  
MOTION BY DEFENDANT HI  
DESERT MOBILE HOME PARK  
L.P. TO DISMISS PLAINTIFFS'  
FIRST AMENDED COMPLAINT  
FILED MAY 20, 2015;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Date: July 13, 2015  
Time: 1:30 p.m.  
Ctrm, 16

Trial Date: April 26, 2016

TO PLAINTIFFS JUNAN CHEN, KELLY YAO WANG, HANGSHUANG  
WANG, JINSHUANG LIU, LICHU CHEN, AND WENQUEI HONG, AND TO  
THEIR ATTORNEYS OF RECORD HEREIN:

NOTICE IS HEREBY GIVEN that on the 13<sup>th</sup> day of July, 2015, at  
1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 16 of the  
above-captioned Court, located at 312 North Spring Street, Los Angeles, California,  
90012, defendant HI DESERT MOBILE HOME PARK LP (erroneously sued as

1 "CAPRI APARTMENTS AT ISLA VISTA") ("Capri") will move this Court for the  
2 following order as to plaintiffs' first amended complaint filed on May 20, 2015:

3 1. For an order dismissing plaintiffs' second cause of action for negligence  
4 as against defendant Capri, for failure to state a claim upon which relief can be  
5 granted. (Fed.R.Civ.P. 12(b)(6)).

6 This motion is made and based on this notice of motion, the attached  
7 memorandum of points and authorities, the papers and records on file in this action,  
8 and upon such additional documents and argument as may be properly before this  
9 Court at the time of the hearing on this motion.

10 This motion is made following the conference of counsel, pursuant to L.R. 7-  
11 3 and Section 5.b. of this Court's standing order, which took place on May 26, 2015.  
12 In accordance with this Court's order of May 28, 2015, this conference of counsel  
13 was in-person, counsel filed their respective declarations within 3 days after this  
14 conference, and defendant waited two days after the last declaration of counsel was  
15 filed before filing this motion.

16  
17 DATED: June 11, 2015

**MANNING & KASS**  
**ELLROD, RAMIREZ, TRESTER LLP**

18  
19  
20 By: /s/ Eugene J. Egan  
21 Eugene J. Egan, Esq.  
22 Attorneys for Defendant  
23 HI DESERT MOBILE HOME PARK LP  
24 (erroneously sued as "CAPRI  
25 APARTMENTS AT ISLA VISTA")

26 ///

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **I. INTRODUCTION**

4 On May 23, 2014, Elliot Rodger killed his roommates Hong and Wang, and  
5 their friend Chen, with knives and other weapons in an apartment which defendant  
6 HI DESERT MOBILE HOME PARK LP (sued and served herein as "Capri  
7 Apartments at Isla Vista") ("defendant" or "Capri") rented to Hong, Wang, and  
8 Rodger.

9 Plaintiffs are the parents of Hong, Wang, and Chen. In their sole cause of  
10 action for negligence against defendant, they allege that defendant had a duty to  
11 protect Hong, Wang, and Chen from Rodger's homicidal rampage, in which a total  
12 of six people were killed and fourteen more were injured.

13 Defendant submits that the allegations of plaintiffs' first amended complaint  
14 are insufficient to impose a duty upon defendant to protect plaintiffs' decedents from  
15 Rodger's criminal acts.

16 The measures plaintiffs assert defendant should have undertaken as its duty—  
17 investigate Rodger to ensure that he was a "safe" and "appropriate" roommate, warn  
18 prospective roommates of Rodger's mental illness and dangerous propensities, and  
19 either house Rodger separately or evict him—would have imposed an undue burden  
20 upon defendant. Lacking the qualifications to identify, yet alone diagnose, mental  
21 illness or propensity for violence in Rodger—or in any other tenant—satisfying the  
22 duty alleged would require defendant to hire mental health professionals to screen  
23 all tenants. It would further require defendant to either warn other tenants of certain  
24 findings, or use those findings to evict tenants. The resultant burden to defendant  
25 would be significant expense for hiring qualified professionals, a substantial risk of  
26 violating the right of privacy of all tenants and of unlawfully discriminating against  
27 tenants identified as having a mental disability, and the financial burden of resultant  
28 litigation.

Further, the actual duty which the case law imposes upon defendant is based upon actual knowledge. Plaintiffs' allegations concerning defendant's actual knowledge of Rodger's propensity for violence are based upon six incidents that occurred over a period of two years and eight months. Plaintiffs' allegations are conclusory and not supported by sufficient factual allegations, and regardless, the nature of these six incidents did not give defendant actual knowledge of Rodger's criminal propensities.

Accordingly, this Court should grant defendant's motion to dismiss plaintiffs' first amended complaint.

## **II. SUMMARY OF THE ALLEGATIONS OF PLAINTIFFS' FIRST AMENDED COMPLAINT**

In their first amended complaint for damages filed on May 20, 2015, plaintiffs allege that they are the surviving parents of George Chen ("Chen"), David Wang ("Wang"), and James Hong ("Hong") [¶¶3-8]<sup>1</sup>, who were all killed in the apartment of Wang and Hong on May 23, 2014, by roommate Elliot Rodger ("Rodger"). [¶41].

Defendant operates a multi-unit student housing property in Isla Vista that primarily services students of the University of California at Santa Barbara and Santa Barbara City College ("SBCC") [¶20], which included Apartment 7 ("Apt. 7") on Seville Road [¶21], where Rodger was assigned to live with Hong and Wang in September of 2013. [¶36]. Plaintiffs further allege that co-defendant Asset Campus Housing managed defendant's student housing property. [¶19].

Plaintiffs assert a claim for negligence against defendant, seeking general and special damages for plaintiffs' resulting emotional and physical damages. [¶57].

On June 4, 2011, Rodger moved to Isla Vista to attend the summer session at SBCC. [¶21]. Defendant paired Rodger with two roommates to live with in Apt. 7

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<sup>1</sup> All subsequent bracketed references will be to plaintiffs' first amended complaint filed on May 20, 2015 (Doc. 35) unless otherwise noted.

1 in the main Capri complex on Seville Road. [¶21].

2 In August of 2011, after the summer session ended at SBCC, Rodger's  
3 roommates moved out and Rodger lived in Apt. 7 alone for about a month. [¶22].  
4 Then defendant assigned two new roommates, both male Hispanics, to Apt. 7.  
5 [¶22]. Rodger considered them to be "rowdy, inferior, pig-faced thugs" [¶22].  
6 Within days after they moved in, Rodger confronted these roommates, insulting  
7 them and telling them that he was superior. [¶22]. One of Rodger's roommates had  
8 to be restrained by the other. [¶22]. Rodger went to the leasing manager and  
9 explained everything that had happened. [¶22]. Shortly thereafter, Rodger signed a  
10 lease for another, larger apartment. [¶22].

11 In September of 2011, Rodger moved into his new apartment and Capri  
12 assigned Spencer Horowitz ("Horowitz") as his roommate. [¶23]. After a few  
13 weeks Rodger developed a self-described "psychological problem" because Rodger  
14 believed that Horowitz could see how pathetic Rodger's life was. [¶23].

15 In January of 2012, Rodger became enraged when Horowitz brought a girl  
16 back to his room. [¶24] Rodger was furious and jealous because he believed that  
17 Horowitz was "chubby" and "even shorter than [he] was". [¶24] Rodger told  
18 Horowitz that he was foolish for being so proud of having "an ugly whore" in his  
19 room. [¶24]. Afterwards, Rodger and Horowitz became hostile toward each other  
20 and their roommate relationship became unworkable. [¶24].

21 On information and belief, plaintiffs allege that in January of 2012, Horowitz  
22 began to fear for his personal safety. Horowitz informed his father that he believed  
23 Rodger to be mentally ill and posed a threat of violence. [¶25]. Horowitz and his  
24 father began taking action to remove Horowitz from his living situation due to the  
25 danger posed by Rodger. [¶25]. Horowitz and his father communicated to Capri,  
26 both in in-person meetings and through written correspondence, that Rodger was a  
27 threat and posed a danger to Horowitz. [¶25]. Horowitz and his father eventually  
28 arranged for Horowitz to move out of the apartment and find other living



1 accommodations. [¶25].

2 On September 11, 2012, Rodger “threw a wild tantrum, screaming and crying  
3 for hours on end”, all the while thrashing the furniture with a wooden practice  
4 sword, frustrated after he did not win a lottery jackpot drawing. [¶27]. On  
5 information and belief plaintiffs allege that Rodger’s screaming was overheard by  
6 Rodger’s neighbors and the apartment manager. [¶27].

7 In September 2012, Capri transferred Rodger back to Apt. 7 on Seville Road.  
8 [¶28]. Rodger later wrote “I trusted that the manager had the sense to pair me with  
9 mature people, knowing my experiences with those two barbaric housemates I had  
10 to deal with a year previously.” [¶28]. After about a month (October of 2012),  
11 CAPRI assigned Rodger two new roommates, whom he described as “timid geeks”  
12 who were “quiet, respectful and friendly”. [¶28]. Rodger registered for classes and  
13 then dropped them. [¶28].

14 In November of 2012, after losing the Powerball lottery, Rodger cried for  
15 hours and called his parents complaining that he was a 21 year old virgin, unable to  
16 get a girlfriend or make friends, and expressed that he would never be happy. [¶29].  
17 Rodger’s parents arranged for him to begin seeing a psychiatrist. [¶29].

18 In April of 2013, Rodger posted hateful, angry, deeply misogynist and racist  
19 material under his own name on various websites. [¶32]. Virtually all of the  
20 content Rodger had posted online was easily discoverable with simple Google  
21 searches of his name. [¶32].

22 On July 20, 2013, Rodger went to a party in Isla Vista in an intoxicated state.  
23 [¶34]. He became angry at a group of girls whom he believed were ignoring him,  
24 and tried to push some of them off a ledge. [¶34]. A group of male students  
25 intervened and pushed Rodger off the ledge, breaking his ankle. [¶34] As he  
26 stumbled away from the party, Rodger realized that he had lost his Gucci sunglasses  
27 during the altercation. [¶34]. Rodger went to the wrong house and demanded his  
28 sunglasses back. [¶34]. The occupants of this house called Rodger names and



1 began kicking and punching him. [¶34]. Rodger left this house and fled the area.  
2 [¶34]. Rodger returned home bruised, disheveled and crying, and told a neighbor at  
3 the Capri Apartments “I’m gonna kill all those motherf\*\*\*ers and kill myself.”  
4 [¶34]. Plaintiffs allege on information and belief that this conversation was  
5 overheard by Rodger's neighbors and the apartment manager. [¶34].

6 On July 21, 2013, Rodger called his father to tell him that he had been  
7 injured. [¶35]. Rodger’s father drove up from Los Angeles to take him to the  
8 hospital. [¶35]. At the hospital, Rodger was interviewed by two deputies from the  
9 Santa Barbara County Sheriff Department ("SBCSD"). [¶35]. Rodger made up a  
10 story that he had been pushed off the ledge by bullies. [¶35]. The deputies  
11 interviewed others who said that Rodger was the only aggressor and had targeted  
12 women. [¶35]. The deputies did no further follow up and the matter was dropped.  
13 [¶35].

14 In September of 2013, after surgery on his ankle and a period of recuperation  
15 at his mother’s house, Rodger returned to Apt. 7. [¶36]. Capri assigned Hong and  
16 Wang as his roommates in Apt. 7. [¶36].

17 On January 15, 2014, Rodger became annoyed at his roommates because he  
18 did not like the smell of their cooking. [¶37]. Rodger responded by repeatedly  
19 hiding or taking their pots and pans so they could not cook. [¶37]. Hong and Wang  
20 repeatedly asked, and then repeatedly demanded, the return of their property. [¶37].  
21 Eventually, when Rodger did not comply, Hong took Rodger's candles and candle  
22 holders and again demanded the return of his pots and pans. [¶37]. Rodger then  
23 place Hong under citizen’s arrest and Rodger called the SBCSD. [¶37]. After the  
24 deputies arrived at Apt. 7 and interviewed all parties, they arrested Hong for an  
25 infraction (petty theft). [¶37] This charge against Hong was ultimately dismissed  
26 due to insufficient evidence. [¶37]. Plaintiffs allege on information and belief that  
27 defendant was aware that law enforcement officer had come to Apt. 7 due to a  
28 dispute between Rodger and his roommates. [¶37].

1 In April of 2014, Rodger uploaded numerous videos to YouTube expressing  
 2 his jealousy and rage toward women, minorities, and sexually active people. [¶39].

3 On April 30, 2014, SBCSD visited Rodger for a “wellness check” in response  
 4 to a call by a mental health worker who had seen Rodger’s online content. [¶40].  
 5 The deputies spoke to Rodger at the doorstep of the apartment but did not ask to  
 6 enter the apartment or search his room. [¶40]. They left after Rodger told them that  
 7 it was a misunderstanding. [¶40]. Plaintiffs allege on information and belief that  
 8 defendant was aware that law enforcement had come to Apt. 7 to conduct a welfare  
 9 check on Rodger. [¶40].

10 On May 23, 2014, Rodger killed Hong and Wang, and their visiting friend  
 11 Chen, with knives and other weapons in Apt. 7. [¶41]. Rodger then emailed his  
 12 manifesto to his parents, family friends, and at least one therapist. [¶41]. Rodger  
 13 then headed out to Isla Vista to continue his "rampage", leaving 3 more people dead  
 14 and 14 wounded. [¶41].

15 **III. THE COURT SHOULD DISMISS PLAINTIFFS' CAUSE OF ACTION**  
 16 **FOR NEGLIGENCE BECAUSE DEFENDANT HAD NO DUTY AS A**  
 17 **MATTER OF LAW TO PERFORM THE MEASURES PLAINTIFFS**  
 18 **WOULD IMPOSE**

19 "A landlord generally owes a tenant the duty, arising out of their special  
 20 relationship, to take reasonable measures to secure areas under the landlord's control  
 21 against foreseeable criminal acts of third parties. [citations]. In each case...the  
 22 existence and scope of a property owner's duty to protect against third party crime is  
 23 a question of law for the court to resolve. [citations]." Castaneda v. Olsher, [41](#)  
 24 [Cal.4th 1205](#), 1213 (2007).

25 "The duty analysis...requires the court in each case (whether trial or  
 26 appellate) to identify the specific action or actions the plaintiff claims the defendant  
 27 had a duty to undertake.... 'First, the court must determine the specific measures the  
 28 plaintiff asserts the defendant should have taken to prevent the harm. This frames

the issue for the court's determination by defining the scope of the duty under consideration. Second, the court must analyze how financially and socially burdensome these proposed measures would be to a landlord, which measures could range from minimally burdensome to significantly burdensome under the facts of the case. Third, the court must identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures, and assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was that this conduct would occur." Castaneda, supra, 41 Cal. 4th at 1214.

"Once the burden and foreseeability have been independently assessed, they can be compared in determining the scope of the duty the court imposes on a given defendant. The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on a landlord." [citation]. Again, other Rowland factors may come into play in a given case, but the balance of burdens and foreseeability is generally primary to the analysis. [citation]." Castaneda, supra, 41 Cal. 4th at 1214.

**A. Measures Which Plaintiffs Claim Should Have Been Performed By Defendant**

In this case, the specific measures which plaintiffs assert that defendant should have undertaken were to (1) investigate Rodger, including a background check and his online postings, to ensure that he was a "safe" and "appropriate" roommate [¶¶ 36 and 56], (2) warn prospective roommates of Rodger's mental illness, violent demeanor, dangerous propensities, racial biases, and serious conflicts with his previous roommates [¶¶ 36, 53, 56], and (3) either house Rodger separately from roommates to whom he posed a potential threat or evict him. [¶¶ 36, 53, 56].

**B. The Burden Placed On Defendant To Undertake These Measures**

Plaintiffs seek to impose an extreme burden upon defendant: to identify and clinically diagnose its tenants for mental illness and dangerous propensities, and

1 then to use that diagnosis to warn other tenants or to evict tenants. Such a duty is  
 2 not supported by the law. "This Court does not believe that any landlord should be  
 3 expected to check the references or background of a prospective tenant for reasons  
 4 other than to protect the landlord's *own* interest." Davis v. Gomez, [207 Cal.App.3d](#)  
 5 [1401](#), 1406 (1989) (emphasis in original). See also: Gill v. New York City Housing  
 6 Authority, [130 A.D. 2d 256](#), 261, 519 N.Y.S.2d 364 (1987) [Plaintiff "presupposes  
 7 that defendant had some duty to investigate [the assailant] so as to be able to assess  
 8 his potential for dangerous behavior. This is not the case." (bracketed material  
 9 added)].

10 As a landlord, defendant was not qualified to make a determination as to  
 11 Rodger's mental illness and dangerous propensities. "The determination as to  
 12 whether a mentally ill individual is dangerous or will become dangerous is one  
 13 which is often difficult for even the most highly trained mental health professionals  
 14 to make reliably. [citation]. It is, accordingly, not the sort of determination which  
 15 landlords, who possess no special expertise in the field of mental health, should be  
 16 required to make. A mentally ill individual whose behavior gives cause for concern  
 17 should be evaluated by qualified professionals as permitted by law and treated if  
 18 necessary. It is not the province of a landlord to perform such an evaluation, nor  
 19 should the results of such an evaluation be a predicate for a tenant's eviction. Those  
 20 who suffer from mental illness should, where appropriate, be treated and, if  
 21 necessary, institutionalized. They should not on the basis of their clinical condition  
 22 be evicted. [citation]." Gill, supra, 130 A.D. 2d at 263. "Nor was it within the  
 23 reasonable province of either [the apartment manager] or his employer to diagnose  
 24 [the tenant] as "psychotic"". Davis, supra, 207 Cal.App.3d at 1406 (bracketed  
 25 material added).

26 Lacking the qualifications to make this diagnosis itself, defendant would be  
 27 forced incur a substantial financial burden in hiring mental health professionals for  
 28 this purpose.

1 Burdening defendant with an unworkable duty to disclose these findings to  
 2 other tenants, or to use these findings to evict other tenants, would substantially risk  
 3 violating those tenant's right to privacy under Article I, Section 1 of the California  
 4 Constitution, and would constitute unlawful discrimination against those tenants on  
 5 the basis of their disability under California Fair Employment and Housing Act.

6 "[I]t is well settled that the zone of privacy created by that provision extends  
 7 to the details of a patient's medical and psychiatric history [citations]. 'The right to  
 8 control circulation of personal information is fundamental. [Citations.] This right  
 9 reaches beyond the interests protected by the common law right of privacy, and may  
 10 be protected from infringement by either the state or by any individual. [Citation.] "  
 11 Pettus v. Cole, [49 Cal. App. 4th 402](#), 440 (1996).

12 Under California Government Code §12955, it is unlawful "[f]or the owner of  
 13 any housing accommodation to discriminate against or harass any person because of  
 14 the... disability... of that person" [California Government Code §12955(a)].  
 15 Additionally, California Government Code §12955(k), makes it unlawful "[t]o  
 16 otherwise make unavailable or deny a dwelling based on discrimination because  
 17 of... disability...." "Disability" under the Act includes, but is not limited to, any  
 18 "mental or psychological disorder or condition". California Government Code §  
 19 12926(j), as incorporated by California Government Code § 12955.3.

20 "Conducting an investigation as to whether a tenant has a disability would be  
 21 especially onerous in light of the fact that it is unlawful '[f]or the owner of any  
 22 housing accommodation to make or to cause to be made any written or oral inquiry  
 23 concerning the disability of any person seeking to... rent or lease any housing  
 24 accommodation.' [citation]." Johnson v. City & County of San Francisco, [137](#)  
 25 [Cal.App.4<sup>th</sup> 7](#), 17 (2006) (citing California Government Code §12955(b)).

26 Thus, defendants then would face another substantial financial burden of  
 27 having to defend litigation brought by those tenants for violation of their right of  
 28 privacy, and for unlawful discrimination in housing accommodations.

**C. The Homicidal Rampage Of Rodger Was So Unlikely That Liability Cannot Be Imposed Upon Defendant**

Finally, the likelihood of a homicidal rampage by a tenant is so remote that the scope of the duty does not encompass the measures identified by plaintiffs. "The foreseeability of a particular kind of harm plays a very significant role in this calculus [citation], but court's task -- in determining 'duty' -- is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather *to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.*" Ballard v. Uribe, [41 Cal. 3d 564](#), 572, n. 6 (1986) (emphasis added).

"[T]he risk of a maniacal, mass murderous assault is not a hazard the likelihood of which makes [defendant's] conduct unreasonably dangerous. Rather, the likelihood of this unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of [defendant's] nonfeasance did not facilitate its happening. [The assailant's] deranged and motiveless attack... is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct." Lopez v. McDonald's Corp., [193 Cal.App.3d 495](#), 509-510 (1987) (bracketed material added).

**IV. THE COURT SHOULD DISMISS PLAINTIFFS' CAUSE OF ACTION FOR NEGLIGENCE BECAUSE DEFENDANT HAD NO ACTUAL KNOWLEDGE OF ANY FACTS MAKING RODGER'S HOMICIDAL RAMPAGE FORESEEABLE**

[F]oreseeability is a "crucial factor" in determining the existence and scope of a legal duty [citation][fn. omitted] and... '[f]oreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the



1 court' [citation]." Delgado v. Trax Bar & Grill, [36 Cal. 4th 224](#), 237 (2005).

2 "[W]hen the third party crime is committed by a tenant, foreseeability turns  
3 on whether the landlord had "notice of [the tenant's] propensity for violence."

4 [citations]." Barber v. Chang, [151 Cal. App. 4th 1456](#), 1464 (2007). "What is  
5 apparent from all these cases analyzing defendants' liability for the criminal conduct  
6 of a third party is that foreseeability is the crucial factor [citation] and that—no  
7 matter whether a heightened or lesser degree of foreseeability was required and no  
8 matter whether the actual crime committed or only similar conduct needed to be  
9 foreseen—*foreseeability must be measured by what the defendant actually knew*.

10 None of these cases has held that a defendant owed a duty to take steps to prevent or  
11 respond to third party crime on the basis of constructive knowledge or information  
12 the defendant should have known. We are not aware of any case involving liability  
13 for third party criminal conduct that has held that a special relationship creates a  
14 duty to investigate or that has charged a defendant with making forecasts based on  
15 the information such an investigation might have revealed." Margaret W. v. Kelley  
16 R., [139 Cal. App. 4th 141](#), 156 (2006) (emphasis added).<sup>2</sup>

17 **A. Plaintiffs' Allegations As To Defendant's Actual Knowledge Are**  
18 **Conclusory And Self-Contradictory**

19 Plaintiffs allege that defendant had actual knowledge of (1) Rodger's "bizarre  
20 behavior" [¶36], (2) Rodger's racial biases, mental illness, and dangerous  
21 propensities [¶¶ 52, 53], (3) Rodger's history of conflicts with his roommates [¶36],  
22 and (4) that Rodger was a violent and dangerous threat to his roommates [¶¶ 36, 52]  
23 who "would cause harm to any potential roommates he was paired with". [¶52].

24 Plaintiffs' allegation that Rodger would cause harm to "any potential  
25

---

26 <sup>2</sup> Thus, to the extent that plaintiffs allege that defendant had "constructive  
27 knowledge" of Rodger's bizarre behavior [¶36], history of conflicts with his  
28 roommates [¶36], racial biases, mental illness, and dangerous propensities [¶¶ 36,  
52], this constructive knowledge does not impose any duty upon defendant.



1 roommates he was paired with" [¶52], is contradicted by plaintiffs' allegation that in  
 2 October of 2012, Rodger was assigned two new roommates. [¶28] Rodger  
 3 described these two roommates as "'timid geeks' who were 'quiet, respectful and  
 4 friendly'". [¶28] There are no allegations that Rodger posed a threat to these two  
 5 roommates in plaintiff's first amended complaint, and Rodger appears to have been  
 6 paired with these two roommates for almost one year, until September of 2013,  
 7 when Rodger was paired with Hong and Wang. [¶36]. The implicit admission of  
 8 these allegations is that Rodger did not cause harm to these two roommates.

9 Also, plaintiffs' allegation of Rodger's "bizarre behavior" [¶36], is  
 10 contradicted by the allegation that during the dispute with Hong and Wang on  
 11 January 15, 2015, Rodger called the SBCSD, properly seeking the intervention of  
 12 law enforcement to diffuse the situation. [¶37]. Rodger's act of calling the deputies  
 13 was not "bizarre behavior". It was not the act of a person who had "dangerous  
 14 propensities" toward violence. And, as to the actual "history" of this "conflict", after  
 15 the SBCSD interviewed the parties, the deputies placed *Hong* under arrest, not  
 16 Rodger. [¶37].

17 **B. Plaintiffs' First Amended Complaint Does Not State A Plausible**  
 18 **Claim For Relief Against Defendant Based Upon The Actual**  
 19 **Knowledge Alleged**

20 "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a  
 21 'short and plain statement of the claim showing that the pleader is entitled to relief.'  
 22 As the Court held in Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929,  
 23 the pleading standard Rule 8 announces does not require 'detailed factual  
 24 allegations,' but it demands more than an unadorned, the-defendant-unlawfully-  
 25 harmed-me accusation. [citations]. A pleading that offers 'labels and conclusions'  
 26 or 'a formulaic recitation of the elements of a cause of action will not do.' [citation].  
 27 Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further  
 28 factual enhancement.' [citation]." Ashcroft v. Iqbal, [556 U.S. 662](#), 677-678, 129 S.

1 Ct. 1937, 173 L. Ed. 2d 868 (2009).

2 "Two working principles underlie our decision in Twombly. First, the tenet  
3 that a court must accept as true all of the allegations contained in a complaint is  
4 inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of  
5 action, supported by mere conclusory statements, do not suffice. [citation]. Rule 8  
6 marks a notable and generous departure from the hypertechnical, code-pleading  
7 regime of a prior era, but it does not unlock the doors of discovery for a plaintiff  
8 armed with nothing more than conclusions. Second, only a complaint that states a  
9 plausible claim for relief survives a motion to dismiss. [citation]. Determining  
10 whether a complaint states a plausible claim for relief will... be a context-specific  
11 task that requires the reviewing court to draw on its judicial experience and common  
12 sense. [citation]. But where the well-pleaded facts do not permit the court to infer  
13 more than the mere possibility of misconduct, the complaint has alleged--but it has  
14 not 'show[n]'--'that the pleader is entitled to relief.' [citation]." Ashcroft, supra, 556  
15 U.S. at 678-679.

16 "In keeping with these principles a court considering a motion to dismiss can  
17 choose to begin by identifying pleadings that, because they are no more than  
18 conclusions, are not entitled to the assumption of truth. While legal conclusions can  
19 provide the framework of a complaint, they must be supported by factual  
20 allegations. When there are well-pleaded factual allegations, a court should assume  
21 their veracity and then determine whether they plausibly give rise to an entitlement  
22 to relief." Ashcroft, supra, 556 U.S. at 679.

23 While plaintiffs' first amended complaint contains allegations concerning  
24 numerous incidents involving Rodger, plaintiffs' first amended complaint  
25 specifically relies upon six of those incidents in support of their claim that defendant  
26 had actual knowledge of Rodger's propensity for violence.

**1. Incident Of August of 2011 Between Rodger And His  
 Hispanic Roommates**

Plaintiffs allege that Rodger told the leasing manager everything that had happened concerning his confrontation with his two male Hispanic roommates in August of 2011. [¶ 22].

*Assuming arguendo* that defendant had actual knowledge of Rodger's insults, statements, and racial epithets in August of 2011 toward his two male Hispanic roommates, it did not put defendant on actual notice that Rodger had a propensity for later setting upon a violent rampage against roommates and strangers.

As to the allegations of racism, in Andrews v. Mobile Aire Estates, [125 Cal.App.4th 578](#) (2005), the court held that one tenant's harassing and annoying behavior toward another tenant, which included "using racial epithets and other verbal abuse" [Andrews, supra, 125 Cal.App.4th at 596], "did not make his battery of the neighbor sufficiently foreseeable for imposition of a tort duty; it did not 'put defendants on notice of [the assailant's] propensity for violence.' [citation]." Andrews, supra, 125 Cal.App.4th at 596.

Further, the propensity for violence in this incident was not demonstrated by Rodger, but by the Hispanic roommate who had to be restrained by the other Hispanic roommate. [¶28].

Accordingly, the Court should determine that this roommate incident did not put defendant on actual notice that Rodger had a propensity for violence toward his roommates sufficient to support the imposition of a duty upon defendant to protect plaintiffs' decedents from Rodger's homicidal rampage.

**2. Incident In January of 2012 Between Rodger And Roommate  
 Horowitz**

Plaintiffs allege that in January of 2012, Horowitz and his father communicated to defendant, both in in-person meetings and through written correspondence, that Rodger was a threat and posed a danger to Horowitz. [¶25].

1        *Assuming arguendo* that defendant had actual knowledge of Rodger's rage,  
 2 jealousy, and verbal abuse in January of 2012 toward Horowitz regarding the latter's  
 3 girlfriend [¶24], it did not put defendant on actual notice that Rodger had a  
 4 propensity for setting upon a violent rampage against roommates and strangers.  
 5 Andrews, supra, 125 Cal.App.4th at 596.

6        As to the allegation of jealous rages, Plaintiffs allege that in January of 2012,  
 7 after Rodger insulted Horowitz's girlfriend, Horowitz and Rodger "became hostile  
 8 towards each other and their roommate relationship became unworkable" [¶24], that  
 9 "Horowitz began to fear for his personal safety", "believed Rodger was mentally ill  
 10 and posed a 'threat' of violence", and that "Rodger was a threat and that he posed a  
 11 danger to Horowitz" [¶25]. *Assuming arguendo* these are sufficiently well-pled  
 12 factual allegations to assume the veracity thereof, necessitating a determination of  
 13 whether they plausibly give rise to an entitlement to relief [Ashcroft, supra, 556 U.S.  
 14 at 679], the question then arises whether the opinions expressed by Horowitz and his  
 15 father two and an half years prior to the incident, and while apparently seeking a  
 16 new living arrangement for Horowitz, plausibly give rise to an entitlement to relief  
 17 against defendant for Rodger killing Hong, Wang, and Chen. The "context" of this  
 18 incident [Ashcroft, supra, 556 U.S. at 679] was a dispute between two male college  
 19 students (Rodger and Horowitz) where one had a female companion and the other  
 20 did not. Judicial experience and common sense inform that the reasonably  
 21 foreseeable threat of violence was fisticuffs between Rodger and Horowitz; a city-  
 22 wide rampage commencing at the apartment leaving 6 people dead and 14 wounded  
 23 was not the threat reasonably to have been foreseen. "[W]here the well-pleaded  
 24 facts do not permit the court to infer *more than the mere possibility of misconduct*,  
 25 the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to  
 26 relief." Ashcroft, supra, 556 U.S. at 679.

27        Accordingly, the Court should determine that this roommate incident between  
 28 Rodger and Horowitz did not put defendant on actual notice that Rodger had a

1 propensity for violence toward his roommates sufficient to support the imposition of  
 2 a duty upon defendant to protect plaintiffs' decedents from Rodger's homicidal  
 3 rampage. Indeed, plaintiffs' allegations admit to a harmonious relationship with the  
 4 next set of roommates with whom Rodger was paired. [¶ 28].

### 5 **3. Incidents of September 11, 2012 and July 20, 2013**

6 Plaintiffs allege on information and belief that the apartment manager (1)  
 7 "overheard" Rodger screaming for hours on end in his apartment on September 11,  
 8 2012, when he did not win a lottery jackpot drawing [¶ 26], and (2) "overheard"  
 9 Rodger crying and telling a neighbor at the Capri Apartments on July 20, 2013, "I'm  
 10 gonna kill all those motherf\*\*\*ers and kill myself", after Rodger returned from the  
 11 party in Isla Vista. [¶34].

12 "[D]istrict courts may properly consider allegations pled on information and  
 13 belief in determining whether claims have been adequately pled under Rule 8. That  
 14 an allegation is pled on information and belief is neither dispositive nor particularly  
 15 germane. Per Iqbal and Twombly, the proper inquiry remains whether the plaintiff  
 16 has presented a non-conclusory factual allegation." Waldo v. Eli Lilly & Co., 2013  
 17 WL 5554623, [2013 U.S. Dist. LEXIS 145772](#), \*15 (E.D. Cal. Oct. 7, 2013).

18 Plaintiffs have alleged no facts as to what the circumstances were which  
 19 support the conclusory allegations that (1) Rodger's screaming on September 11,  
 20 2012, was "overheard" by the apartment manager, and that (2) Rodger's  
 21 conversation with the neighbor on July 20, 2013, was "overheard" by the apartment  
 22 manager. Without any such facts, plaintiffs have presented only their own  
 23 speculation as to what the apartment manager may have "overheard".

24 Even if the Court were to indulge the overhearing of these outbursts as well-  
 25 pleaded factual allegations, rather than conclusions, and assume their veracity, when  
 26 considered in their "context" [Ashcroft, supra, 556 U.S. at 679] they are insufficient  
 27 to give rise to the duty plaintiffs seek to impose. What Rodger was heard screaming  
 28 over for hours on September 11, 2012, was a lost bet, not a roommate. Even if

1 extreme or protracted, such a tantrum does not render plausibly foreseeable Rodger's  
 2 homicidal rampage more than a year-and-a-half later.

3 As to Rodger's outburst on July 20, 2013, its "context" was Rodger crying in  
 4 frustration and shame after having been pushed off a balcony at one party, then  
 5 punched and kicked at another. The anger being conveyed by Rodger is toward  
 6 people who literally almost killed him (whether he "deserved" it or not), not toward  
 7 roommates. To the contrary, the "context" is that now back at home, Rodger was  
 8 crying to one of his neighbors, not threatening them.

9 Finally, while Rodger's conduct in these incidents may have been unusual or  
 10 bizarre, it did not give defendant actual knowledge that this behavior would escalate  
 11 into a homicidal rampage.

12 "Although the reported conduct of [the tenant] was perhaps disquieting...  
 13 none of it involved any physical violence or real threat to cause bodily harm...."

14 Davis, supra, 207 Cal.App.3d at p. 1404 (bracketed material added).

15 "Consequently, while [the tenant's] conduct might have represented a common  
 16 nuisance, it does not follow that anyone should have foreseen the escalation of that  
 17 behavior into a fatal shooting. The reality is that persons exhibiting similarly  
 18 "bizarre" behavior are to be seen on the streets of every major metropolitan  
 19 community. Fortunately, few are ever actually dangerous." Davis, supra, 207  
 20 Cal.App.3d at p. 1405 (emphasis added).

21 Accordingly, the Court cannot rely upon these bare allegations to determine  
 22 that defendant had actual notice that Rodger had a propensity for violence toward  
 23 his roommates sufficient to support the imposition of a duty upon defendant to  
 24 protect plaintiffs' decedents from Rodger's homicidal rampage.

#### 25 **4. Law Enforcement Visits Of January 15, 2014 and April 30,** 26 **2014**

27 Plaintiffs further allege on information and belief that (1) defendant was  
 28 "aware" that law enforcement officers had come to Apt. 7 on January 15, 2014, due



1 to a dispute between Rodger, Hong, and Wang [¶37], and that (2) defendant was  
 2 "aware" that law enforcement officers had come to Apt. 7 on April 30, 2014, to  
 3 conduct a welfare check on Rodger. [¶40].

4 Once again, plaintiffs allege no facts demonstrating what the circumstances  
 5 were to support the conclusory allegation that defendant was "aware" of the law  
 6 enforcement visits on January 15, 2014 or on April 30, 2014. Waldo v. Eli Lilly &  
 7 Co., 2013 WL 5554623, 2013 U.S. Dist. LEXIS 145772, \*15 (E.D. Cal. Oct. 7,  
 8 2013). Plaintiffs only hope that such may be the case, rendering them merely  
 9 conclusory.

10 *Assuming arguendo* that defendant was "aware" of these visits, the question is  
 11 still begged as to what exactly these visits would have made defendant aware.

12 As to the law enforcement visit on January 15, 2014, the answer presumably  
 13 is that defendant became "aware" that *Hong*, not Rodger, had been placed under  
 14 arrest. Defendant's awareness of this arrest would not be a reasonable basis to  
 15 suspect Rodger was prone to a homicidal rampage.

16 As to the law enforcement visit on April 30, 2014, the answer presumably is  
 17 that defendant became "aware" that the basis of the visit was to perform a welfare  
 18 check, and further assumes that defendant was "aware" that the reason for the  
 19 welfare check was a potential for violence toward others (as opposed to drug use,  
 20 depression, or self-harm). Accepting all of those assumptions *arguendo*, defendant  
 21 would only have been aware that trained law-enforcement personnel concluded,  
 22 after having been tasked with making the specific inquiry, that no evidence existed  
 23 to support that Rodger posed any threat of harm to himself or others. Thus,  
 24 defendant's awareness of this welfare check would not be a reasonable basis to  
 25 suspect Rodger was prone to a homicidal rampage.

26 Accordingly, the Court should determine that these incidents involving law  
 27 enforcement did not put defendant on actual notice that Rodger had a propensity for  
 28 violence toward his roommates sufficient to support the imposition of a duty upon



1 defendant to protect plaintiffs' decedents from Rodgers' criminal acts.

2 **V. CONCLUSION**

3 Holding an owner liable to a tenant for the criminal conduct of another tenant  
4 requires actual knowledge of facts making the crime foreseeable. But plaintiffs do  
5 not allege that defendant had actual knowledge of recidivistic thievery, serial  
6 violence, or any other kind of criminal conduct from which further instances were  
7 plausibly to be expected. While the recitations of plaintiff's first amended complaint  
8 attempt to create an unsettling chronology (even mining Rodger's secret Manifesto  
9 as though it had been public knowledge) as to this defendant, plaintiffs allege only  
10 six incidents to have been the source of its actual knowledge. Neither separately nor  
11 collectively do these incidents constitute a bases to impose a legal duty upon  
12 defendant to foresee and protect against Rodger's violent break from reality. Many  
13 parties had far greater familiarity with Rodger – mental health professionals, trained  
14 law enforcement, and plaintiffs' decedents themselves – and yet they did not foresee  
15 his rampage or they would have removed Rodger, or themselves, from the  
16 apartment. Though their cause of action against defendant is styled as negligence,  
17 ultimately, plaintiffs seek to make this defendant strictly liable as the guarantor of  
18 the conduct of its tenants. That, however, is not the law. Plaintiffs implicitly  
19 recognize this absence of knowledge when they argue for a duty to diagnose and  
20 warn, i.e., to learn what is not presently known. But a duty requiring owners to play  
21 mental health professional is manifestly unworkable as the case law recognizes, and  
22 would be terrible policy. This defendant is not in any manner a wrongdoer in the  
23 circumstances at bar, and should be dismissed from this action.

24 For the foregoing reasons, this Court should sustain defendant's motion to  
25 dismiss plaintiffs' first amended complaint.

26  
27  
28

1 DATED: June 11, 2015

**MANNING & KASS**  
**ELLROD, RAMIREZ, TRESTER LLP**

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7 sued as "CAPRI APARTMENTS AT ISLA  
8 VISTA")  
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